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May 19, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: September 13, 2004

Case No.: TIA-0198

XXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits based on the employment of her late father (the Worker). An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be granted.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE

facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.¹

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* §3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* §3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Worker was employed as a machinist at the Oak Ridge Plant (the plant). The Worker is deceased. The application stated that he worked at the plant for approximately 25 years -- from 1959 to 1984. The Applicant requested physician panel review of two illnesses -- melanoma and asbestosis. The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination on each of the claimed conditions. The Panel found no evidence of melanoma, but it did find evidence of the diagnosis and removal of basal cell carcinomas. The Panel issued a negative

¹ www.eh.doe.gov/advocacy

determination on the melanoma, but did not issue a determination on the basal cell carcinomas. For the asbestosis claim, the Panel found that the Worker did not have the condition nor the precursor condition of pleural plaques. The Panel attributed the Worker's pulmonary condition to smoking.

The OWA accepted the determination, and the Applicant appealed.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

The Panel's failure to issue a determination on the basal cell carcinomas was Panel error. As a rule, physician panels are not required to consider conditions not specifically claimed by the Worker. On the other hand, where the claimed illness is clear, the panel should consider it. See *Worker Advocacy*, Case No. TIA-0047, 28 DOE ¶ 80,333 (2004) (claim of asbestosis includes pleural plaques). In this case, the Worker claimed melanoma rather than basal cell carcinoma. The Panel found that the Worker had basal cell carcinomas and, therefore, should have issued a determination on whether the condition was related to his work at DOE.²

The Applicant has not demonstrated Panel error on the asbestosis determination. The Panel found no evidence of the disease or the precursor condition of pleural plaques, and the Applicant has not addressed that finding other than to express general disagreement. Accordingly, we find no Panel error regarding this claimed condition.

In compliance with Subpart E, these claims will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's review of these claims does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

² If the Worker also had melanoma, the Applicant should ask the DOL how to submit information on that condition.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0198 be, and hereby is, granted.
- (2) The Physicians Panel should have issued a determination on the Worker's basal cell carcinoma. Consideration of this illness is in order.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 19, 2005